SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1036

CHRYSLER CORPORATION, DE SOTO MOTOR CORPORATION, PLYMOUTH MOTOR CORPORATION, DODGE BROTHERS CORPORATION AND CHRYSLER SALES CORPORATION,

Appellants,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

STATEMENT AS TO JURISDICTION.

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STATUTES.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA,
SOUTH BEND DIVISION

Civil No. 9

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHRYSLER CORPORATION, ET AL.,
Defendants.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Chrysler Corporation, DeSoto Motor Corporation, Plymouth Motor Corporation, Dodge Brothers Corporation and Chrysler Sales Corporation (hereinafter referred to as the appellants or the "Manufacturer") submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this case.

The basic question involves the authority of the trial court to modify an anti-trust consent decree over the objection of the defendants.

A. Jurisdiction Statute.

The statutory provisions that confer jurisdiction upon the Supreme Court to review the decree of the District

Court upon direct appeal are Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C., Sec. 29 and Section 238 of the Judicial Code, as amended, 28 U. S. C., Sec. 345. The direct appeal provided by these statutes is the sole mode of review available to appellants. The following cases sustain the jurisdiction of the Supreme Court:

Swift & Co. v. *United States*, 276 U. S. 311, 323;
United States v. *California Co-op. Canneries*, 279 U. S. 553, 558;
United States v. *Swift & Co.*, 286 U. S. 106, 109;
Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436.

B. Dates of Decree and Petition for Appeal.

The date of the final decree of the District Court here sought to be reviewed is February 16, 1942. It reads as follows:

"FINAL DECREE—IN MODIFICATION OF FINAL DECREE AS MODIFIED.

This matter came on to be heard by the Court on a motion of the United States for modification of the final decree as modified, and the Court having heard argument of counsel and having considered the matter, and it having appeared to the Court that the allowance of such motion is just and equitable,

NOW, THEREFORE, IT IS ORDERED, ADJUDICATED AND DECREED that the aforesaid final decree as amended shall be and is hereby modified so that the second paragraph of section 12 thereof shall read as follows:

It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1943 requiring

General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of the respondents or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

AND IT IS FURTHER ORDERED, ADJUDICATED AND DECREED that except as thus modified the modified decree as previously entered shall stand in full force and effect.

BY THE COURT: Thos. W. Slick."

Petition for allowance of appeal was presented on February 18, 1942, to Honorable Thomas W. Slick, United States District Judge for the Northern District of Indiana, and by him allowed that day.

Statement.

This is an appeal from a final decree of the District Court of the United States for the Northern District of Indiana, South Bend Division, modifying an earlier final decree which had been entered with the consent of the parties in a suit in equity brought by the United States under Section 4 of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. Sec. 4. The consent decree that the District Court thus attempted to modify restrained appellants, among other things, from acquiring any interest in any finance company, subject, how-

ever, to the condition that, if an effective final order should not have been entered before January 1, 1941, similarly requiring General Motors Corporation to divest itself of ownership of General Motors Acceptance Corporation, then nothing in the consent decree should preclude the Manufacturer from acquiring an interest in a finance company (See pp. 19-20 of the decree). The District Court by a "Final Decree—In Modification" entered December 21, 1940, extended the period of conditional restraint from January 1, 1941, to January 1, 1942, by changing the date in one paragraph of the original decree. The Supreme Court on December 8, 1941, dismissed the appeal from that decree "for want of a quorum of Justices qualified to sit", and on January 5, 1942, denied petition for rehearing.

The second modifying decree, from which this appeal is taken, has again extended the period of conditional restraint to January 1, 1943, by another change of date.

The pertinent facts may be briefly stated:

Original proceedings.—On November 7, 1938, in the United States Court for the Northern District of Indiana, South Bend Division, the United States filed its complaint in equity against the Manufacturer, appellant herein, and against the Commercial Credit Company and certain wholly-owned subsidiaries of the Commercial Credit Company. The bill, under Section 1 of the Sherman Act, alleged that Chrysler Corporation, together with these finance companies, had conspired to exclude all other finance companies from financing the sale of automobiles. The bill prayed, among other things, that Chrysler Corporation be restrained "from acquiring in any way an interest in any finance company or by gift, loan or otherwise rendering financial assistance to any finance company".

On the same day that the bill and answer filed there was submitted to the court a proposed consent decree, which was

entered as the final decree of the court on November 15, 1938. Among other restraints and requirements imposed upon the defendant motor companies, the decree provided in Section 12:

> The Manufacturer shall not make any loan to or purchase the securities of Respondent Finance Company [that is, the Commercial Credit Company and its subsidiaries] or any other finance company . . .

However, it was also provided, in the next paragraph of the same section that:

> It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a.

Proceedings against General Motors.—The United States had originally obtained three indictments—one against appellants herein and the finance companies with which it had been dealing, one against the Ford Motor Company and certain finance companies with which it had been dealing, and one against General Motors Corporation and its wholly owned finance company. Appellants herein consented to the equity decree quoted last above and the Ford Motor Company also consented to a similar decree, but General

Motors declined. Accordingly, the Government quashed the indictments against Chrysler and Ford, and Section 12 of the Chrysler consent decree and the corresponding section of the Ford decree were designed to protect them against prolonged disadvantage in competition with the non-consenting General Motors Corporation.

Subsequently in the criminal proceeding against General Motors on the indictment mentioned above the jury returned verdicts of guilty against General Motors Corporation and General Motors Acceptance Corporation; the court imposed sentence on November 17, 1939; the Circuit Court of Appeals for the Seventh Circuit affirmed, 121 F. 2d 376; the Supreme Court denied petition for certiorari October 13, 1942, and denied petition for rehearing November 10, 1942, No. 352, October Term, 1941.

Notwithstanding the express condition of the decree against appellants, the United States waited more than twenty months before it filed its bill in equity against General Motors Corporation and General Motors Acceptance Corporation to compel General Motors to divest itself of the Acceptance Corporation. Not until October 4, 1940, less than three months before the expiration of the period within which the United States had agreed to secure a decree against General Motors or release appellants from the restraint of Section 12, did the United States file its bill in equity in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking the result upon which continued restraint of appellants under Section 12 was predicated.

First motion and decree for modification.—On December 17, 1940, the United States filed its "motion" for modification of the consent decree praying that in the second paragraph of Section 12 of the decree (as quoted above), the date "January 1, 1942" be substituted for "January 1, 1941".

The answer of appellants denied the allegations of the motion of the United States and prayed that the motion be dismissed or, if not dismissed, that plaintiff be required to plead or elect with particularity the ground upon which it relied, and finally that defendants be given sufficient notice and opportunity to prepare its response and defense.

The motion was heard December 21, 1940. Despite the fact that the Government had the burden of proof and that there was no waiver of proof by appellants, the Government submitted no evidence. The attorney for the Government, pressed to state the ground of his motion, merely stated "I am relying on the good judgment of the court". The court on the same day, December 21, 1940, made its "Final Decree—in Modification" directing the changing of the date in the second paragraph of Section 12 of the decree of "January 1, 1942" as requested by the Government. Appeal was allowed by the trial court but on December 8, 1941, was dismissed by the Supreme Court "for want of a quorum of Justices qualified to sit". Petition for rehearing was denied January 5, 1942.

Present proceeding. Motion for Modification of the Final Decree and of the Final Decree as Modified.—On December 15, 1941, the United States filed in the United States District Court for the Northern District of Indiana a new motion, a "Motion for Modification of the Final Decree and of the Final Decree as Modified". This new motion prays that the restraint contained in Section 12 of the decree be extended for an additional year to January 1, 1943, *i. e.*, that the restriction to which appellants gave their consent be extended without their consent and over their objection for a total of two years. In substance the motion alleges that the primary purpose of the provisions of Section 12 of the consent decree was to have the right of the United States to prohibit affiliation between an automobile com-

pany and a finance company determined in the General Motors proceeding; and that a "subsidiary purpose" was to protect respondents against "undue delay". Asserting that circumstances not attributable to undue delay or laches of plaintiff have prevented conclusion of the General Motors proceedings, the motion then alleges: "The essential purposes of the decree would be defeated if * * * the prohibition against affiliation were allowed to lapse prior to final determination" of the General Motors proceeding. Attached to the motion is an affidavit by a representative of the Department of Justice as to the truth of the statements in the motion.

The answer of appellants in substance sets up as defenses: (1) Demurrer—that the motion fails to state a claim upon which relief can be granted; and (2) Denial of substantially all allegations upon which the motion was based. It prays that the motion be dismissed; or, if not dismissed, that plaintiff be required to plead with particularity any changed basic conditions of fact or law upon which it relies, and that defendants be given sufficient notice and opportunity to prepare their response and defense. Attached to the answer is the affidavit of counsel stating that he was present at substantially all of the conferences and negotiations at which the parties agreed upon the contents of the final decree and that the answer is true of his own knowledge.

Evidence.—Pursuant to order of the trial court, the case came on for hearing December 22, 1941. The first defense was overruled. Despite the fact that the Government had the burden of proof and that there was no waiver of proof by appellants, the only evidence submitted by the Government related solely to the question of undue delay or diligence of the Government in prosecuting the civil suit against General Motors Corporation and consisted merely of pleadings, motions, stipulations and orders entered in

that suit.[1] No other evidence was submitted for the Government.

Action of the trial court.—On the same day, December 22, 1941, the court entered its order providing:

> . . . the Court having heard argument of counsel and the Government having introduced its evidence and the defendants having requested a continuance in order to produce further evidence—
>
> It is Ordered that the hearing be and the same is hereby continued until the 16th day of February 1942.
>
> It is further Ordered that pending the final disposition of the Government's motion the provisions of the decree enjoining Chrysler Corporation from acquiring an interest in a finance company shall remain in full force and effect, notwithstanding Paragraph 12 of said decree.

At the hearing on February 16, 1942, no evidence was adduced by either party. The appellants, having in the meantime determined that the evidence offered by the Government failed utterly to show any ground for the modification or extension of the consent decree, rested their case and renewed their motion that the plaintiff's motion be dismissed.

Thereupon the court made findings of fact and conclusions of law.[2] In accordance therewith it entered a Final Decree—In Modification of Final Decree as Modified directing the changing of the date in the second paragraph of Section 12 of the decree to "January 1, 1943" as requested by the Government. There was no opinion.

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[1] From these it appears that the Government entered into a series of stipulations extending to July 15, 1941, the time for answer by the defendants in that case, and that the court thereafter extended the time in which to answer to January 15, 1942.

[2] The findings of fact and conclusions of law are set out in the Appendix.

Substantial Nature of the Questions Presented.

A. *The Government, as the moving party, had the burden of proof.*—The so-called motion of the United States in substance seeks modification of the decree on the ground that the purposes or intent of the parties to the consent decree are not those shown by the words of the consent decree and that the provisions of the decree must be changed to avoid defeat of the alleged "primary", "subsidiary" and "essential" purposes and intents of the parties as stated in the motion. Since the motion seeks an extended restraint which the parties subject to the original decree oppose, it is, while ancillary in character, nevertheless in the nature of an original bill so far as that restraint is concerned. It admitted of an answer and, its allegations having been denied, required proof to be taken and the facts ascertained. *Buffington* v. *Harvey*, 95 U. S. 99, 107; *Pacific Railroad Co.* v. *Ketchum*, 101 U. S. 289, 295; *Kaw Valley Drainage District* v. *Union Pac. R. Co.*, 165 Fed. 836, 837. The Government, therefore, as the moving party asserting the affirmative of the issue, sustained the burden of proving all the facts necessary to establish the right to the imposition or extension of the injunction against Chrysler. *United States* v. *Linn*, 1 How. 104, 111; *The "Edith"*, 94 U. S. 518, 522; *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, 267; *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U. S. 25, 35.

B. *The Government in support of its allegations adduced no evidence of purpose or intent contrary to the plain meaning of the language of Section 12 of the decree.*—By the unambiguous words of the "express condition" contained in the second paragraph of Section 12 of the consent decree, the restraint against acquisition by Chrysler of ownership or control of, or interest in a finance company expired on January 1, 1941, the Government having failed to obtain before that date an effective final decree requiring General

Motors to divest itself of all ownership and control of General Motors Acceptance Corporation. Indeed, the trial court found (Finding No. 6) "that the decree provided for a termination of the bar against affiliation, if the civil proceedings against General Motors Corporation were not successfully concluded by a court of last resort by January 1, 1941."

The purpose or intent of the decree or of the parties to it is to be determined, of course, by reference to the words used. And the allegations of the motion, so far as they may be regarded as asserting a purpose or intent at variance with the provisions of the second paragraph of Section 12 of the original consent decree, are patently unfounded in view of the unequivocal language of the "express condition" to which the Government, with full knowledge of the facts freely consented.

In any event, no evidence in support of these allegations is even purported to have been offered. The affidavit of counsel, being purely *ex parte*, could not be considered as evidence on final hearing. *Cucullu* v. *Hernandez*, 103 U. S. 105, 110.

Despite this utter lack of proof the trial court found as a fact (Finding No. 3):

> That the provisions of Sec. 12 of the consent decree * * * were framed upon the basis that the ultimate rights of the parties thereunder should be determined by the Government's civil antitrust proceedings against General Motors Corporation and affiliated companies.

Equally without support in the evidence is the Court's conclusion as a matter of law (Conclusions of Law, No. 3):

> That the purpose and intent of the decree will be carried out if Chrysler is given the opportunity at any future time to propose a plan for the acquisition of a finance company and to make a showing that such plan

is necessary to prevent Chrysler Corporation from being put at a competitive disadvantage during the pendency of complainant's civil litigation against General Motors Corporation, et al.

Thus, the order here involved, is based upon a conclusion of the court as to the purpose and intent of the parties utterly without evidence to support it, and in direct conflict with the express provisions of the second paragraph of Section 12, which clearly negative such purpose and intent.

The question presented, therefore, is whether authority in the court to order extension of the restraint may be based on the consent or alleged purpose and intent of the parties, where such consent, alleged purpose or intent are clearly negatived by the express language of the original consent decree, and where the plaintiff has introduced no evidence to show the alleged purpose or intent.

C. No Mistake of the Parties or Change in Circumstances Justifying Modification of the Consent Decree is Either Alleged or Proved.

The instant motion, in sharp and significant contrast with plaintiff's first motion for modification, omits entirely any allegation that at the time of the execution of the decree "it was then believed by the parties" that the General Motors case could be more promptly disposed of, or that the time "was by mistake of the parties underestimated", or that "the parties hereto, at the time of the entering of the consent decree, anticipated that such criminal case would be disposed of without extensive and lengthy litigation". This motion contains no allegation of mistake of the parties and the plaintiff offered proof of none.

The plaintiff's motion does allege that:

> "Circumstances arising since entry of the decree • • • have prevented bringing these proceedings to

a conclusion by the date specified in paragraph 12 * * *."

But this falls far short of allegation of "new and unforeseen conditions" sufficient to justify amendment of the consent decree. The rule is stated in *United States* v. *Swift & Co.*, 286 U. S. 106, 119-120:

> Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned. * * * What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone * * * and the composition held for nothing.

Within the meaning of this rule, the failure of the Government to obtain a decree against General Motors before January 1, 1941, is obviously not a new and unforeseen condition, nor does the allegation of the motion state that it was. Indeed, the very fact that the obtaining of a decree against General Motors before January 1, 1941, is referred to in Section 12 as an "express condition" clearly shows that the parties had regard to that event and contracted with specific reference to its uncertainty, fully foreseeing the possibility that it would not occur before the stated day. If, as the theory of "changed conditions" necessarily assumes, the happening of the event before January 1, 1941 had been relied upon by the parties as a certainty, then the apparent contingency stated in the decree would have been illusory, its character as a condition would have been destroyed, and the whole of paragraph two of Section 12 would have been superfluous.

Furthermore, the fact that under the express terms of the consent decree Chrysler, by expiration of time, has become free to acquire and retain ownership of, or control over, or interest in any finance company falls far short of

the "showing of grievous wrong" set up as a prerequisite to modification in *United States* v. *Swift & Co., supra.* Where equity jurisdiction is invoked, not to remove, but to impose a restraint, it is established that such jurisdiction will be exercised—whether by way of "modification" of an earlier consent decree or otherwise—only when a present or threatened violation of the antitrust laws is alleged and proved. *Swift and Company* v. *United States,* 196 U. S. 375, 396; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 179; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 377; *United States* v. *E. I. du Pont de Nemours & Co.,* 188 Fed. 127, 129, 130; *United States* v. *E. I. du Pont de Nemours & Co.,* 273 Fed. 869, 873; *Aluminum Co. of America* v. *Federal Trade Commission,* 299 Fed. 361, 363, 365, cert. denied 261 U. S. 616. The motion here includes no allegation that acquisition by Chrysler of ownership, or control of, or interest in, a finance company would constitute or threaten a violation of law. Certainly no evidence has been offered to show that defendants are presently violating or threatening to violate the antitrust laws or any other law. "A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved." *Foster* v. *Goddard,* 1 Black 506, 518.

There is thus presented the question whether the parties not consenting, and the allegations of the motion being controverted by the answer of the defendants, the court below erred in modifying on motion the consent decree so as to extend one of its restraints where the plaintiff made no allegation or proof of changed conditions or unlawfulness under the Sherman Act.

Finally, there is presented the question whether, as a matter of law, the trial court had authority in any event to modify, without the consent of the parties, a decree entered and based upon the consent of the parties,—particularly when such modification relates to a provision of the original de-

cree which appears upon its face to have been the subject of special consideration and agreement by the Government as well as by the defendants. *United States* v. *International Harvester Co.*, 274 U. S. 693, 703.

Conclusion.

It is thus plain that this appeal is within the exclusive jurisdiction of the Supreme Court and involves the review of substantial errors of the trial court.

Respectfully submitted,

PARKER, CRABILL, CRUMPACKER, MAY,
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WILLIAM STANLEY,
(S.) WILLIAM D. DONNELLY,
Attorneys for Appellants.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.

Civil No. 9.

UNITED STATES OF AMERICA, *Complainant*,

vs.

CHRYSLER CORPORATION, ET AL., *Defendants*.

Findings of Fact and Conclusions of Law.

The Court makes the following findings of fact:

1. That jurisdiction was specifically retained in this Court for the purpose of enforcing compliance with the decree, or for the purpose of modifying the decree upon proper showing.

2. That this Court has jurisdiction to hear and dispose of the subject matter of complainant's motion.

3. That the provisions of Sec. 12 of the consent decree for which modification is sought were framed upon the basis that the ultimate rights of the parties thereunder should be determined by the Government's civil antitrust proceedings against General Motors Corporation and affiliated companies.

4. That time was not of the essence with respect to lapse of the bar against affiliation.

5. That to safeguard defendants against undue delay in such proceedings the decree provided for suspension of certain of its prohibitions in the event convictions were not obtained in the criminal case against General Motors Corporation by January 1, 1940.

6. That the decree provided for a termination of the bar against affiliation, if the civil proceedings against Gen-

eral Motors Corporation were not successfully concluded by a court of last resort by January 1, 1941.

7. That the Court takes judicial notice of the fact that convictions were obtained in the criminal proceedings against General Motors Corporation, et al. on November 17, 1939.

8. That the Government has proceeded diligently and expeditiously in its suit to divorce General Motors Acceptance Corporation from General Motors Corporation.

9. That further extension of the bar against affiliation will not impose a serious burden upon defendants.

The Court rules as a matter of law:

1. That the order of this Court dated December 21, 1940, modifying the decree, so as to extend to January 1, 1942, the bar against affiliation, became the law only of the first petition for extension in the case, since the Supreme Court was unable to muster a quorum to hear the matter on appeal.

2. That the Court has jurisdiction to entertain complainant's motion and to make a proper order pursuant thereto.

3. That the purpose and intent of the decree will be carried out if Chrysler is given the opportunity at any future time to propose a plan for the acquisition of a finance company, and to make a showing that such plan is necessary to prevent Chrysler Corporation from being put at a competitive disadvantage during the pendency of complainant's civil litigation against General Motors Corporation, et al.

Dated this 16th day of February, 1942.

THOS. W. SLICK,
Judge, United States District Court,
Northern District of Indiana.